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**BEFORE THE SURFACE TRANSPORTATION BOARD OF THE UNITED
STATES OF AMERICA**

FINANCE DOCKET NO. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD COMPANY-WESTERN ALIGNMENT

NORTHERN PLAINS RESOURCE COUNCIL'S SCOPING COMMENTS

I. Introduction

Northern Plains Resource Council (Northern Plains) respectfully submits these comments on the scope of the Surface Transportation Board's (STB) Supplement dated February 3, 1999 (1999 Supplement Scope) Northern Plains is a grassroots conservation and family agriculture groups that helps organize Montana citizens to protect our water quality, family farms and ranches, and unique quality of life. The proposed Tongue River Railroad (TRR) threatens to destroy all of these values if constructed.

The proposed TRR has loomed over the farmers and ranchers of the Tongue River valley for over two decades. The STB approved the construction of the segment of the railroad from Miles City to Ashland in 1986, nearly two decades ago. The Tongue River

Railroad Company (Company) has not laid one foot of track. During that time, the Company has found time to abuse the eminent domain laws by threatening landowners with condemnation. In those two decades, the Company has not moved an ounce of dirt. The Bureau of Land Management recently deemed the proposed TRR so stale that it did not consider it a reasonably foreseeable project for purposes of analyzing the cumulative impacts of coal bed methane development.

Northern Plains submitted scoping comments on the 1999 Supplement on March 4, 1999. These scoping comments are intended to supplement those comments.

II. Scope

NEPA mandates that the STB “determine the scope and the significant issues to be analyzed in depth in the environmental impact statement.” 40 C.F.R. §1501.7(a)(2). The scope of an EIS consists of the range of actions, alternatives, and impacts to be evaluated. To determine the scope of an EIS, the STB is required to consider three types of actions, three types of alternatives, and three types of impacts. 40 C.F.R. §1508.25.

The STB must evaluate three types of actions in an EIS:

(1) Connection actions, which means that they are closely related and therefore should be considered in the same impacts statement. Actions are connected if they:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulative significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency should analyze these actions in the same impact statement when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

40 C.F.R. §1508.25(a)(1)-(3).

Tongue River I, Tongue River II, and Tongue River III are connected actions because they are all part of a single proposed railroad. Construction of any one section of the proposed railroad would be meaningless unless the entire railroad is constructed. The STB concedes this point in the 1999 Supplement Scope when it states that “proposed project is a single line from Miles City to Decker.” Nonetheless, the STB continues to refuse to complete a new EIS for the entire railroad.

In the 1999 Final Scope of Supplement, the STB offers no explanation to explain why the supplement is limited to analyzing the impacts of the proposed Western Alignment and does not even mention the NEPA regulations regarding the proper scope of an EIS. The STB’s decision to limit the scope of the supplement to the 17.3-mile long Western Alignment is arbitrary, capricious, and otherwise not in accordance with the law.

Significant new information and changes in circumstances relevant to the environmental impacts of the Tongue River Railroad have emerged since 1999.

First and foremost is the large-scale development of coal bed methane (methane) in the Powder River Basin of Montana and Wyoming. The Bureau of Land Management recently signed Records of Decision approving the development of up to 77,000 methane wells and related infrastructure in the Powder River Basin (Basin) over the next decade. Methane development is predicted to cause violations of air quality standards for

particulates and other pollutants and cause violations of water quality standards.

Methane development is also predicted to cause significant impacts on wildlife habitat and populations, soil resources, native vegetation, ground water resources including springs and wells, noise levels, and the economic viability of family farms and ranches in the Tongue River valley. The STB needs to analyze the cumulative environmental impacts of the proposed TRR when combined with the impacts from methane development.

The State of Montana is also in the process of developing Total Maximum Daily Loads (TMDLs) for numerous pollutants for the Tongue River and its tributaries. This process is directly relevant to the impacts of the proposed railroad on water quality. The Northern Cheyenne Indian Tribe has also established water quality standards for the waters of the reservation and have petitioned the Environmental Protection Agency for primacy to implement and enforce the CWA.

Since 1999, the mountain plover has been designated as a threatened species and numerous other species including the sage grouse and black-tailed prairie dog have been petitioned for listing under the Endangered Species Act. There have also been numerous other species of fish and wildlife added to the list of Species of Concern maintained by the Bureau of Land Management, United States Forest Service and Montana Department of Fish, Wildlife, and Parks. The new EIS needs to analyze the cumulative impacts of the proposed railroad on these species and their habitats.

Since 1999, the Montana Supreme court has ruled that the Montana Constitution protects every citizen's fundamental right to a clean and healthful environment and that

the right is anticipatory in nature. The new EIS needs to analyze the implications of this right for the construction and operation of the railroad.

The new EIS needs to evaluate the substantial changes the Company has made regarding the proposed railroad since 1986 including changes in right of way locations etc. Northern Plains refers the STB to numerous sworn statements regarding changes in the route location submitted in 1998.

Northern Plains takes issue with the STB statement that United States Supreme Court's ruling regarding the jurisdictional limits of the Clean Water Act is irrelevant to these proceedings. The CWA covers intermittent streams and wetlands, and the Company still needs a Section 404 permit prior to discharging dredge and fill materials into such waters.

The STB must consider three types of potential impacts in the EIS:

- (1) Direct Impacts which are those "caused by the action and occur at the same time and place."
- (2) Indirect Impacts which are those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."
- (3) Cumulative Impacts are impacts on the environment which result from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency...or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. §1508.25(b)(1)-(3), 40 C.F.R. §1508.7, and 40 C.F.R. §1508.8(a)(b).

When the TRR was originally proposed in the early 1980s, the stated purpose and need was to service the proposed Montco Coal Mine near Ashland, Montana. The Montco Mine is dead and the consequently, the public convenience and necessity of the proposed TRR seems questionable at best. There are no proposed coal mines in southeast Montana and the existing mines in the Decker area have recently announced plans to

reduce their work forces. Furthermore, the STB recently approved the Dakota, Minnesota, & Eastern Railroad that will provide additional rail service for coal mines in the southern portions of the Powder River Basin. The new EIS needs to re-examine the public convenience and necessity of the proposed railroad in light of current economic conditions and determine whether there is in fact any public convenience and necessity that justifies the construction of this proposed railroad in its entirety.

III. Miscellaneous Issues

- The EIS should explain how increased demand for PRB coal is likely given the fact that the Decker Mine plans to lay off a significant portion of its work force in the near future.
- The EIS needs to examine the implications of the STB's approval of the Dakota, Minnesota, & Eastern Railroad to service the Powder River Basin on the need for the proposed TRR.
- The EIS needs to re-examine the transportation and financing issues related to the construction of the entire route.
- The EIS needs to consider an alternative under which the STB's approval is conditioned on the Company completing the construction of the entire railroad within a prescribed period of time. This alternative would provide landowners in the valley with some degree of certainty.
- The EIS needs to analyze the impacts of changes to the State of Montana eminent domain laws made in 2001.

- The EIS needs to analyze the cumulative impacts of the proposed railroad on the spread of noxious weeds in the Tongue River valley and the indirect impacts of the spread of such weeds on farms and ranches and wildlife habitat and native vegetation.

IV. Conclusion

Northern Plains requests that the STB go back to the drawing board and prepare a new environmental impact statement that analyzes the cumulative impacts of the entire Tongue River Railroad (Miles City to Decker) on the human environment when combined with the cumulative impacts of other reasonably foreseeable development.

The first step the STB needs to take is to rescind its approval of Tongue River I and Tongue River II. The STB should then require the Company to submit a new application for the entire 130-mile route. If the new application warrants proceeding, the STB should start a new NEPA process with a new scoping process.

Sincerely,



Michael Reisner
Northern Plains Resource Council